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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

NATURAL CONTRARIAN, INC.,

Plaintiff and Respondent,

v.

SAMY'S CAMERA, INC.,

Defendant and Appellant.

B205775

(Los Angeles County Super. Ct.
No. BC340858)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Affirmed.

Law Offices of Henry N. Jannol, Henry N. Jannol and Andrea Breuer for
Defendant and Appellant.

K & L Gates, Michael J. Quinn and Christopher J. Kondon for Plaintiff and
Respondent.

Defendant and appellant Samy's Camera, Inc. appeals from a judgment following a court trial in favor of plaintiff and respondent Natural Contrarian, Inc. in this action arising out of payment for professional photography equipment that was delivered to independent contractor Storm Jenkins. Samy's contends: 1) Contrarian directed Samy's to deliver merchandise to Jenkins; 2) Jenkins was an ostensible agent of Contrarian; and 3) Contrarian ratified the delivery of merchandise to Jenkins. We conclude substantial evidence supports the trial court's findings that Contrarian did not instruct Samy's to release merchandise to Jenkins, Jenkins was not acting as Contrarian's ostensible agent, and no ratification took place. Therefore, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Scott Fraser owns Contrarian, which publishes a financial newsletter featuring market trends and stock recommendations. Contrarian's offices are located in San Diego, where Fraser lives. Fraser also owns Empowered Products, Inc.. Empowered primarily sells personal lubricants.

Jenkins and his business partner Garrett Cunneen had formed a company called RIPS Entertainment. In June 2004, Fraser hired Jenkins and Cunneen as independent contractors to perform work for Empowered. Jenkins proposed marketing concepts and provided photography and graphic design services, including photographing models and products for marketing material and packaging designs. He worked out of an office in Los Angeles leased by Empowered. Empowered provided furniture, a background screen, some cameras, and standard office equipment for Jenkins and Cunneen to use. Jenkins brought equipment that he owned to the office as well.

Fraser wanted to create videos for Contrarian's website similar to videos that are shown on the Wall Street Journal's website. Fraser intended to have Contrarian purchase the equipment, because Contrarian had income and could use the tax deduction, but he planned to use the equipment for Empowered as well. Empowered was not in a position

to buy the equipment because it did not have enough money in its accounts. Ultimately, the equipment would be kept at the Contrarian office in San Diego.

Fraser asked Jenkins about the type of equipment he would need to create videos and where to buy the equipment. He needed a list of recommended equipment and a cost estimate. Jenkins recommended Samy's. Jenkins had purchased professional photography equipment from Samy's salesperson Frank Schlegel for 10 years. Fraser said, "Great. Go get me a list of equipment that I would need to get and perhaps a price estimate." Fraser did not discuss anything else with Jenkins about the purchase. He expected the information to be forwarded to him. Fraser authorized Jenkins to get a cost estimate, but he was not authorized to do anything more than that.

On September 25, 2004, Jenkins went to Samy's. Schlegel prepared a list of equipment on a form with the word "invoice" printed at the top. Schlegel testified later that the document was not actually an invoice, but an order for goods. Jenkins gave Schlegel the customer information for the form. The form stated, "Sold to: Storm Jenkins" followed by an address in Los Angeles, which was Empowered's office. The salesperson was identified on the form by the initials FS. The field after the words "Ship to:" was blank. The invoice had a customer number on it and a contact number, which was the telephone number at Empowered's office. Several items were listed with prices. Most of the items were for still photography, not videography, with the exception of one video camera. The total cost of the items was \$66,641.46.

Jenkins told Schlegel that a wire transfer would be coming in to pay for the equipment. Although Samy's often receives wire transfers from third parties, Schlegel had never done a transaction paid by a wire transfer. Samy's had no written procedures for salespeople concerning wire transfers. Schlegel spoke to Samy's credit manager Sue Bernie to find out whether Samy's could accept a wire transfer. Bernie said that they could. Schlegel gave a copy of Samy's wire transfer instructions to Jenkins with the form listing the equipment.

The documents were faxed from Samy's to Fraser's home fax number. Although the form stated that it was an invoice, Fraser assumed it was a cost estimate. He was not concerned that Jenkins was listed as the purchaser. He assumed Jenkins's name was on the form because Jenkins had requested the list. Fraser did not have any discussion with Jenkins about the amount, ownership of the equipment, or delivery.

Fraser wanted to pay by wire transfer because he would receive confirmation that the money was received. On September 27, 2004, Fraser went to his bank in San Diego and filled out a request to transfer funds. The requester listed was Scott Fraser and the account title listed was "Natural Contrarian, Inc. (same as above)." The amount to be transferred was \$66,641.46.

When Samy's receives a wire transfer from a third party to pay for a purchase, Samy's considers the person who ordered the merchandise to be the customer and not the third party payor. The salesperson tells the accounting department that he or she is expecting a wire transfer in a certain amount. When a wire transfer is received, Samy's bank calls the accounting department. The bank informs Samy's of the receipt and the amount of the transfer, but not the name of the originator. An employee in the accounting department informs the salesperson that the wire transfer has been received. The salesperson is responsible for working with the customer to deliver the merchandise. The bank also sends a notification of the incoming wire to Samy's by mail, which Samy's files with its bank statement. Samy's had never received a wire transfer that did not have a corresponding prior order.

In this case, Schlegel asked Bernie if a wire transfer had come in for \$66,641.46. She told him that it had. Schlegel assumed the funds came from Jenkins. He thought Jenkins was purchasing the equipment for himself and did not think he was acting on behalf of any individual or entity. The wired funds were credited against the order under Jenkins's customer number. Schlegel believed Jenkins was entitled to receive the equipment purchased with the funds. Schlegel had never heard of Contrarian before the instant action.

The day that the funds were wire transferred, Jenkins picked up equipment costing a total of \$41,908 and paid for with the wired funds. Several items that he had selected were backordered and not received that day. Several other items with a total cost of \$3,300 varied from the items listed on the September 25, 2004 form.

Fraser expected Samy's to contact him for delivery instructions at the address and telephone number that he had listed on the wire transfer instructions he gave to his bank. He did not try to call the store. Two days after the wire transfer, in a conversation with Jenkins, Fraser mentioned that he had not heard from Samy's and asked Jenkins's opinion. Jenkins said that he had picked up the equipment and it was at Empowered's office in Los Angeles. Fraser was surprised and concerned, because he had not planned for Jenkins to pick up the equipment, but he was not upset. He believed Samy's made a mistake by giving the equipment to Jenkins and he assumed that he would have a discussion with Samy's, but he was confident that he would be able to get the equipment back from Empowered's office and found it permissible for the equipment to stay there for the time being.

The accounting department at Samy's eventually received the bank's notification in the mail of the wire transfer to Samy's account in the amount of \$66,641.46. Contrarian's name and a San Diego address and telephone number were listed under "originator" and under "instructing institution." Samy's filed the document with its bank statement.

From September 27 through October 29, 2004, Jenkins picked up, returned, and exchanged equipment credited against or to the account with the wired funds as reflected in 16 separate invoices. After October 29, 2004, \$1,804.18 of the wired funds remained in the account.

Within a month after the wire transfer, Fraser told his executive assistant Elizabeth Kern that Samy's had delivered the equipment to Jenkins. Fraser asked Jenkins for a list of the equipment with serial numbers and a record of the transaction selling the equipment to Contrarian, in order to include the equipment in the company's insurance

policy. Jenkins promised to gather the information, but several months passed. Fraser visited the Los Angeles office in December 2004 and did not see any new equipment. He had discussions with Jenkins, but did not ask Jenkins about the equipment. Fraser was focused on new product launches and the equipment was not a priority for him. He was not concerned that anything was wrong with respect to the equipment. It was undisputed at trial that Jenkins used equipment that he obtained from Samy's with the wired funds to create marketing materials for Empowered.

In February 2004, Jenkins provided Kern with pictures of photography equipment, including pictures of Jenkins holding equipment, but the pictures were not sufficient for insurance purposes. Kern told Jenkins the pictures were not acceptable and continued to request invoices and receipts. In March 2005, Fraser visited the Los Angeles office to instruct new employees. He did not notice any new equipment.

On May 6, 2005, Fraser met with Jenkins and Cunneen at Empowered's Los Angeles office to determine whether he would continue to use their services in sales and marketing and to look for the equipment. Tension and uncertainty were increasing over whether Jenkins's services would be retained by the company. Fraser wanted to avoid a confrontation, so he did not discuss the equipment with Jenkins. Fraser decided to make the equipment a priority.

In the middle of May 2005, Fraser asked an employee to tell Jenkins to pack up the equipment. Fraser asked Kern to arrange for a courier to pick up the boxes and to contact Samy's for documentation of the September 2004 transaction. Kern called Samy's and explained to an accounting clerk named Christine Hunt that her company had wired funds to Samy's in September 2004, never received any equipment and had no documentation of what had happened to the funds. She explained that she was concerned Samy's had possibly given the equipment to Jenkins, which had not been authorized, and she needed documentation to show where the money went. Hunt said she would provide the information by the end of the week, but Kern did not receive any information.

Kern sent a courier to get the boxes. The courier picked up four or five boxes from the Empowered office and delivered them to Contrarian's warehouse. Jenkins sent an E-mail to Kern listing the contents of the boxes and giving Kern a few days to let him know if anything was missing, or he would assume it was all there. When Fraser opened the boxes, he found items from the office, including an Apple monitor. Fraser does not know if the monitor he received is the same one listed on the cost estimate, although it matched the description. Other than two or three lenses that Fraser did not recognize and the Apple monitor, nothing in the boxes matched the items listed on the cost estimate.

Kern called Hunt again a few weeks later. Hunt said she had faxed the information to Kern. Since Kern had not received anything, she asked Hunt to send the information again. Hunt said she had a lot to accomplish before taking maternity leave, but she would try to get the information together again and send it that week. Kern did not receive anything. In the beginning of June, Kern left a message on Hunt's voicemail saying that she was still waiting for the information.

Fraser wrote to Jenkins in June 2005, to discontinue his services. At the end of the month, Empowered vacated its Los Angeles office. Fraser did not file a police report or an insurance claim for the missing equipment, because he did not have documentation to prove his ownership of the equipment. Kern called Samy's to ask for Hunt's supervisor. She spoke to an accounting file clerk and explained the situation, including her concern that equipment had possibly been given to Jenkins, and her need for documentation. The clerk told Kern that Bernie was Hunt's supervisor and promised to give Bernie her message. The following day, Kern left a message for Bernie on her voicemail. The call was not returned. On July 13 and 15, Jenkins used the remaining funds of \$1,804.18 toward equipment he purchased at Samy's.

On September 15, 2005, Kern called Samy's and spoke with accounting clerk Carolina Brambila who was filling in for Hunt. Kern explained her request again. Kern faxed a cover sheet to Brambila on Empowered letterhead and copies of the September 25 form and the wire transfer confirmation. Brambila spoke with Bernie. Bernie told

Schlegel that someone was requesting records with respect to the wire transfer transaction. Schlegel said he could not release Jenkins's record to anyone but Jenkins. After these conversations, Brambila called Kern and explained that it was Samy's policy not to release information except to the person who placed the order.

On September 19, 2005, Fraser's attorney wrote to Samy's and requested documentation identifying specific equipment purchased with the wired funds. The letter stated that Jenkins was an employee of Fraser's who had obtained an estimate for the purchase of photography equipment. The letter also stated that if Samy's did not provide a detailed invoice, Fraser would demand the return of the funds because Fraser never authorized Samy's to use his funds for any account other than his own and no equipment was purchased in Fraser's account. The controller at Samy's who received the letter did not know who Fraser was and the letter did not mention Contrarian.

Bernie contacted Jenkins about the request for documentation Samy's had received from Fraser and his attorney. On September 21, 2005, Jenkins wrote, "Thank you for contacting me today about [Fraser's attorney's] letter. We are pursuing payment from his client for a significant amount of money. He has engaged in a campaign to disrupt my business relationships, apparently to intimidate me out of seeking to collect what we are due. [¶] I do not wish any of my transaction or account records released to [Fraser or his attorney]. These are confidential business records and can only be released to them subject to a subpoena. Your letting me know about this improper request from them is very much appreciated." Jenkins concluded by asking for a copy of the letter from Fraser's attorney and thanking Samy's for protecting his privacy. After a conversation with an attorney, the controller at Samy's wrote to Fraser's attorney and stated that Samy's would release the documents upon receipt of authorization from their customer.

On October 4, 2005, Contrarian filed a complaint against Samy's. On November 17, 2005, Fraser and Empowered entered into a settlement agreement with Jenkins, Cunneen, and RIPS. The agreement stated that a dispute had arisen out of work performed for Empowered, and the parties to the agreement had made various claims

against one another including, but not limited to, claims relating to possession and ownership of photography-related equipment, possession and ownership of photographs taken by Jenkins and Cunneen while working for Empowered, entitlement to stock in Empowered, a real estate sale, a dissolved corporation, and defamation. The parties to the agreement desired to fully settle all existing disputes between them.

Fraser agreed to pay \$20,000 to Jenkins and Cunneen. Upon the signing of the agreement, Fraser would order and pay for 2000 units of a certain clothing-related product and 2000 packaging units from RP Printing. The product and the packaging would be delivered to Jenkins and Cunneen directly. Fraser and Empowered agreed to cease selling the product and cease using any photographs taken by Jenkins or Cunneen during their work for Empowered. Fraser would no longer use any such photographs on any website that he maintained.

On receipt of the funds, Jenkins and Cunneen would sign documents releasing escrow funds to Fraser from the sale of a property. The release of the escrow funds would satisfy a loan from Contrarian to Jenkins made in connection with the property sale. The agreement contained mutual general releases. There were no third party beneficiaries of the agreement.

When he entered into the settlement agreement, Fraser believed Empowered had a claim against Jenkins with regard to the photography equipment purchased from Samy's, as well as other photography equipment. The settlement agreement referred to photography equipment generally and did not specifically relate to the equipment purchased from Samy's.

On April 6, 2006, Contrarian filed the operative second amended complaint against Samy's for conversion, common counts, fraud, and negligent misrepresentation. On June 6, 2006, Samy's filed a cross-complaint for indemnity against Jenkins. Jenkins filed a cross-complaint against Fraser and Empowered. A three-day bench trial began on May 14, 2007. Jenkins dismissed his cross-complaint without prejudice pursuant to the settlement agreement. Jenkins argued that the agreement settled all of the claims

regarding the photography equipment, including claims made by alter egos and affiliates, and therefore, Contrarian should not be allowed to maintain an action against Samy's that would require Jenkins to defend Samy's action for indemnity. The trial court ruled that the settlement agreement did not include Contrarian and the subject matter of the settlement agreement was unclear and unrelated to issues in the present litigation.

Retail accounting expert Steven Kravitz testified on behalf of Contrarian. Kravitz stated that he has never seen a transaction in which one party arranged to pay for goods purchased by and delivered to another party. Third parties pay for a customer's merchandise only with specific written instructions. Kravitz stated that the customer in the retail industry is the person who pays for the merchandise, regardless of the identity of the person who approaches the salesperson. A retailer who accepts funds in advance of delivering a product holds the funds for the customer until delivery of the merchandise is made. The retailer has a fiduciary responsibility to account for the funds until the merchandise is delivered, or if the merchandise cannot be delivered, to return the funds. A retailer cannot deliver merchandise to a customer's employee without written instructions to do so. Kravitz opined that Samy's should have asked the bank for information about the originator of the transfer and called Contrarian using the information listed on the notification of incoming wire transfer to determine what the funds were to be used for. Samy's could not apply the wired funds to Jenkins's account based on the September 25, 2005 order form unless the funds were from Jenkins. Kravitz opined that if an individual came into a store, ordered merchandise, advised the store that he was going to have funds wire transferred to pay for the order, a wire transfer was received by the store in the exact amount of the order and the amount of the wire transfer was the only information provided by the bank, the store could not credit the individual's account and must wait for confirmation of the payor before releasing the merchandise. Kravitz admitted that he had no experience in the field of camera equipment and no information as to whether it was common for third parties to pay for first party orders in the camera field.

Contrarian's attorney stated that Contrarian would reduce their demand by the amount credited on the cost estimate for the Apple monitor. On September 27, 2007, the trial court issued a tentative decision in favor of Contrarian as against Samy's on all causes of action and in favor of Samy's as against Jenkins on all causes of action. Contrarian prepared a statement of decision. On December 17, 2007, the trial court entered the statement of decision finding in favor of Contrarian on all causes of action and a judgment awarding Contrarian \$75,858.96 as against Samy's. The court found for Samy's as against Jenkins and awarded Samy's \$75,858.96 from Jenkins. Samy's filed a timely notice of appeal.

DISCUSSION

Standard of Review

“In both jury and nonjury trials, factual findings made by the trier of fact are generally reviewed for substantial evidence. [Citations.] Factual issues may be reviewed de novo when the facts are uncontroverted and only one deduction or inference may reasonably be drawn. [Citation.]” (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 500-501.) “Under the substantial evidence standard of review, our review begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the trial court's factual determinations. [Citations.] Substantial evidence is evidence of ponderable legal significance, reasonable in nature, credible, and of solid value. [Citation.] The substantial evidence standard of review applies to both express and implied findings of fact made by the court in its statement of decision. [Citation.]” (*Id.* at p. 501.)

Delivery Instructions

Samy's contends that Contrarian directed Samy's to deliver the equipment to Jenkins. However, the trial court's finding that Contrarian did not provide any delivery instructions to Samy's is supported by substantial evidence. The fact that the order form stated the equipment was being sold to Jenkins did not amount to delivery instructions. The shipping field on the order form was left blank. Fraser testified that he wanted the equipment delivered to San Diego and he expected Samy's to call him to arrange for delivery. Samy's was unaware of Contrarian and did not provide equipment to Jenkins based on delivery instructions from Contrarian. This evidence supports the trial court's finding that Contrarian did not direct Samy's to provide the equipment to Jenkins.

Ostensible Agency

Samy's contends that Contrarian is liable for Jenkins's acts under the doctrine of ostensible agency. We must disagree.

"An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (Civ. Code, § 2300.) "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." (Civ. Code, § 2317.)

"Liability of the principal for the ostensible agent's acts rests on the doctrine of estoppel and its essential elements are representation by the principal, justifiable reliance thereon by the third party and change of position or injury resulting from such reliance [citations]." (*Reusche v. California Pac. Title Ins. Co.* (1965) 231 Cal.App.2d 731, 736 (*Reusche*).)

"A principal who puts an agent in a position that enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to

liability to such third persons for the fraud. The principal is liable although he is entirely innocent, although he has received no benefit from the transaction, and although the agent acts solely for his own purposes. Liability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that, from the point of view of the third persons, the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him [citations]. The law reasons that where one of two innocent parties must suffer, the loss should be accepted by the principal who is responsible for the selection of the agent and for the definition of his authority [citation]." (*Reusche, supra*, 231 Cal.App.2d at pp. 736-737.)

It is undisputed that Samy's believed Jenkins was the principal in their transactions. Samy's cannot rely on the doctrine of ostensible authority, because Samy's did not believe Jenkins was an agent of Contrarian acting within his authority.¹

Agency by Ratification

Samy's contends Contrarian ratified the delivery of merchandise to Jenkins. We disagree.

"Ratification is the subsequent adoption by one claiming the benefits of an act, which without authority, another has voluntarily done while ostensibly acting as the agent

¹ We note that although Samy's pled an estoppel defense in its answer and raised estoppel in its trial briefs, Samy's has not raised any issue on appeal regarding estoppel based on section 3543 of the Civil Code, which provides that "[w]here one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." "Misplaced confidence has been held to be negligence within section 3543 and has resulted in the estoppel of a true owner from asserting title against an innocent party (*Asp v. Lowry* [(1953)] 117 Cal.App.2d 81, 85; *Phelps v. American Mortgage Co.* [(1940)] 40 Cal.App.2d 361). Estoppel has been invoked where one has been induced by the dilatory or negligent conduct of another to refrain from taking such action as lay in his power to retrieve his position and save himself from loss (*Benner v. Industrial Acc. Com.* [(1945)] 26 Cal.2d 346, 349; *Crittenden v. McCloud* [(1951)] 106 Cal.App.2d 42, 48)." (*Reusche, supra*, 231 Cal.App.2d at p. 738.)

of him who affirms the act and who had the power to confer authority (Civ. Code, §§ 2310, 2312). A principal cannot split an agency transaction and accept the benefits thereof without the burdens (*Price v. McConnell* [(1960)] 184 Cal.App.2d 660).” (*Reusche, supra*, 231 Cal.App.2d at pp. 737.)

Samy’s cannot rely on ratification, because the equipment was not furnished to Jenkins with the belief that he was acting as an agent of Contrarian. Moreover, Contrarian was not aware of all the facts of the transaction, because some items of equipment that Jenkins ultimately selected were not on the original order form.

DISPOSITION

The judgment is affirmed. Respondent Natural Contrarian, Inc. is awarded its costs on appeal.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.